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Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SCOTT THOMAS PETITIONER

v.

UNITED STATES OF AMERICA RESPONDENT

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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57 pp

QUESTIONS PRESENTED FOR REVIEW PURSUANT TO RULE 14(1)(a)

At the trial court level, and again, at the appellate court level, Plaintiff-Appellant pressed the same issue presented to this Court: can NASA be liable to Scott Thomas for injury to him resulting from its own active negligence? The trial court applied the rules of passive negligence, contrary to the decisions of the Mississippi Supreme Court as well as other federal circuit courts, to find that NASA was not liable. The Trial Court applied the absolute bar of contributory negligence rather than the statutory rule of comparative negligence, contrary to Mississippi law and other federal decisions applying such in the light of the Tort Claims Act. The questions presented are:

I. Did the trial court and the Fifth Circuit Court of Appeals, contrary to the decisions of other federal circuit courts, the United States District for the Southern District of Mississippi, and the Mississippi Supreme Court, improperly apply the rules of passive owner-contractor negligence applicable to a case of premises liability where there is active owner-contractor negligence?

II. Does Mississippi's statutory rule of comparative negligence, which the trial court and the Fifth Circuit refused to apply, require the apportionment of fault in this case?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Scott Thomas (Plaintiff, now Appellant) and the United States of America ("NASA" as Appellee).

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals, incorporating the decision of the district court, was entered on January 17, 2001, and is unreported. The Judgment of the U.S. Court of Appeals for the Fifth Circuit denying the Petition for Rehearing on March 12, 2001, which was filed in the District Court on March 21, 2001, is likewise unreported. These are included in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on March 12, 2001. This Court has jurisdiction under 28 U.S.C. §1254(1). As delineated in Supreme Court Rule 10(a), the decision in this case conflicts with other Federal Circuits regarding the issue of liability for the consequences of negligent exercise of de facto control of the work site by the United States in Federal Tort Claims litigation. It also conflicts with controlling common law decisions of the Mississippi Supreme Court as well as the positive law of the state legislature as they relate (1) to the liability of an owner or his contractor to a subcontractor and its employees where there is active negligence on the part of the owner-contractor, and (2) the application of the law of comparative negligence and apportionment of fault.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Federal Tort Claims Act are found at 28 U.S.C. §2674:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private

individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

. . .

The Mississippi statute on comparative negligence, Miss. Code Ann. §11-7-15 (1972), states:

> In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

STATEMENT OF THE ISSUES

Appellant asserts that the following two issues, jointly and severally, merit the grant of its Petition for Writ of Certiorari:

I. Did the trial court and the Fifth Circuit Court of Appeals, contrary to the decisions of other Federal Circuit Courts, the United States District for the Southern District of Mississippi, and the Mississippi Supreme Court, improperly apply the rules of passive owner/contractor negligence applicable to a case of premises liability where there is active owner/contractor negligence?

II. Does Mississippi's statutory rule of comparative negligence, which the trial court and the Fifth Circuit refused to apply, require the apportionment of fault in this case?

COURSE OF PROCEEDINGS AND DISPOSITION

A. Proceedings in the Trial Court Below

Scott Thomas, an electrical engineer employed with Johnson Controls World Services Inc. (hereinafter, "Johnson Controls"), was injured when a 13.8 kilovolt electrical switchgear arced, causing severe burns to Thomas on April 12, 1995. Johnson Controls was the Facility Operating Service Contractor ("FOSC") at John C. Stennis Space Center ("SSC" or "Stennis"), a NASA-owned facility in Hancock County, Mississippi. NASA also owned the switchgear.

Thomas filed suit pursuant to the Federal Tort Claims Act [28 U.S.C. §§1346(b), 2671 et seq] against the United States asserting that his injuries were caused in part by the active negligence of NASA personnel. Specifically, Thomas claimed that NASA actively interfered with the work site by taking control of the site from Johnson Controls without its knowledge. Due to its negligent supervision of

the site, Thomas was injured.

The case was tried by the Honorable David C. Bramlette, United States District Judge, on September 13, 1999. At the close of the Plaintiff's case, the Defendant moved for judgment pursuant to Fed. R. Civ. Pro. 52(c), which the Trial Court granted. The Trial Court applied the rule of Jones v. James Reeves Contractors, Inc., 701 So.2d 774 (Miss.1997), and Hill v. International Paper Co., 121 F.3d 168 (5th Cir. 1997), and found that Johnson Controls and Thomas, as independent contractor and its employee, had knowledge of the dangerous condition of the switchgear. The court also held that NASA as the premises owner and contractor owed no duty to Thomas. Alternatively, the Trial Court held that NASA delegated responsibility of day-to-day operation of its electrical distribution system to Johnson Controls, and that NASA retained no control over the switching procedure or the actions of Johnson Controls' personnel on site prior to Scott Thomas' injury.

Counsel for the United States authored the Memorandum Opinion and Order which the Court adopted verbatim on November 18, 1999, and which the Clerk entered on November 22, 1999.

Plaintiff filed his Notice of Appeal on January 11, 2000.

B. Proceedings before the Panel

The Panel affirmed the trial court by Summary Calendar, adopting the Findings and Conclusions of the trial court. A Petition for Panel Rehearing was denied on March 12, 2001, and the Judgment of the Fifth Circuit was filed on March 21, 2001, in the District Court.

C. Statement of the Facts

NASA owns Stennis Space Center in Hancock County, Mississippi, and all of its appurtenant buildings and facilities. The Stennis complex is managed by a Facility Operating Service Contractor, Johnson Controls, pursuant to contract with NASA. NASA has adopted and promulgated a Stennis Safety Manual governing contractor activities at SSC (Ex. P-12), to which both NASA and the FOSC are subject.

NASA owns Building 1103, where Thomas was injured. NASA also owns the electrical distribution system and substation including two 13.8KV lines that provide power to Building 1103, Circuits 12 and 22. Thomas was injured while examining a damaged 13.8 kilovolt switchgear at Building 1103. The transfer switchgear is connected to both circuits, and is designed so that Building 1103 will receive its electrical power from only one of the circuits at a time, i.e., either circuit 12 or 22. The switchgear has two switch boxes, one on either end of the switchgear, each of which controls the two circuits to Building 1103.

Each switchbox contains one transfer switch, which can be in the closed (or energized) position only if the switch has a key in it. The manufacturer, S&C Electric, designed the system with one key operation so that only one switch could be in the closed (energized) position at a time.

To illustrate the operation of the switchgear, the two switch boxes will be identified as switch A and switch B. To close (energize) switch A, the key must be placed in the switch lock mechanism, and the switch manually closed. The key cannot be removed without manually opening Switch A (the de-energized or "off" position). Switch A cannot be again closed without the key being reinserted into the lock mechanism. According to the manufacturer's manual, to close (energize) switch B, switch A must be

opened (de-energized), the key removed, inserted into the switch B lock, and then switch B can be closed (energized). This safety mechanism is known as a Kirk Key Interlock. The interlocking safety mechanism may be overridden with the use of two keys, one inserted in each switch at the same time, a scenario forbidden by the manufacturer.

On June 11, 1987, upon completion of Building 1103, the State of Mississippi turned Building 1103 over to NASA. The manuals for the newly installed S&C transfer switchgear were transferred to NASA , but NASA left keys in both switches, contrary to the instructions contained in the manuals provided by the switch manufacturer.

In 1995, Plaintiff Thomas was an Area Engineer for Johnson Controls at the B Test Complex, where NASA performed its solid rocket main engine tests.

In April, 1995, Chuck Stewart, NASA Construction Manager at Stennis, was overseeing a NASA direct contract[1] to change out certain old switchgears, some of which serviced Circuits 12 and 22. Part of that work required that Stewart coordinate the transfer of power for all buildings from Circuit 22 to Circuit 12. This allowed 22 to be de-energized so that the contractor could tie in all of the new switchgears to Circuit 22 while the buildings could still maintain power through Circuit 12. To accomplish this Johnson Controls' high voltage electrical crew was tasked to transfer certain buildings from Circuit 22 to Circuit 12. Stewart's responsibilities required his presence on the morning of April 12, 1995, to coordinate activity between the contractor and Johnson Controls in the event of a power outage on that date.

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1. A direct contract is one in which NASA directly contracts with a third party for services, rather than the FOSC hiring the contractor.

Project Manager and Electrical Engineer Walt Parks was NASA's technical advisor on the direct contract . He was also NASA's technical monitor overseeing Johnson Controls. Specifically, he had oversight responsibility for the switching operation that took place on April 12, 1995, including the work crew's compliance with the NASA Safety Manual.

On the morning of April 12, 1995, Steve Giroir, Roddy Bilbo and Whitey Barnes, the Johnson Controls high voltage electrical crew, began switching the buildings from Circuit 22 to Circuit 12. At Building 1103, they attempted a simultaneous switch-over whereby they would close (energize) Circuit 12 before opening (de-energizing) Circuit 22, thereby avoiding a power outage. This required the use of two kirk keys in the locks, overriding the safety mechanism of the Kirk Key interlock, so that both circuits could be closed (energized) at the same time. NASA's investigative report concluded that this was contrary to the provisions of the manufacturer's installation manual, and in direct violation of the NASA Safety Manual. T. 62-3, 66. Ex. P-56 at I-10. Also contrary to the NASA Safety Manual, NASA had granted no authorization for such a procedure.

NASA had allowed the two Kirk keys to remain in both interlocks, contrary to the direction of the S&C installation manual, from the date that the switchgear had been installed. T. 70.

Upon reaching Building 1103, when Bilbo and Barnes attempted the simultaneous switching, the switchgear arced, blowing the door on the Circuit 22 side open about six to twelve inches. NASA concluded that the simultaneous switching caused the arc. To secure the area from unauthorized personnel as required by the NASA Safety Manual, Bilbo and Barnes placed warning tape around the site.

When the switchgear arced, the lights in the building

blinked, and Chuck Stewart went to the office of Walt Parks to determine what had happened. The two NASA engineers used their radios to begin calling around the facility to determine "whether these blips or this problem was under [Stewart's] jurisdiction, under direct contract, or whether it was under Mr. Parks' jurisdiction with his oversight of the switching operation." T. 297.

Scott Thomas, upon arriving at his office, was immediately informed of some outages at the test complex. His immediate superior instructed him to meet Bruce Beckman and Lamar Nowland, Johnson Controls engineers. Beckman radioed Thomas and informed him that he and Nowland were on their way to Building 1103. While they were talking, Stewart got on the radio and told "everyone" to meet him and Walt Parks at Building 1103, at Parks' instruction. T. 181, 298.

When Scott Thomas arrived at Building 1103, he got out of his truck and found Stewart, Parks, Beckman and Nowland standing between the switchgear and the aesthetic wall.[2] Stewart and Parks had entered into the taped barricaded area at a time when neither of them was authorized to be there, which violated published NASA safety procedures. T. 88-89, 300, 313. While Stewart did not believe himself qualified to invade the tape or work on the switchgear, he and Parks did so. T. 300, 303. Stewart knew that his entry into the taped-off area violated NASA safety standards. T. 300, 312-13. Parks opened the switchgear door and began investigating inside of the switch. T. 185, 188, 303. Thomas testified that the nature of Parks' examination of the switchgear led him to believe that it was de-energized. Thomas testified that he did not see

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2. The purpose of the wall was to block the sight of the switchgear from the parking lot.

the barrier tape. At no time did Parks or Stewart tell Thomas to leave the scene because it was dangerous or because it was secured . T. 194, 303, 308-09, 313.

The NASA Safety Manual requires that in an imminent danger situation:

> The official in charge of the workplace or the individual empowered to act for that official shall take immediate abatement action or cease operations and withdraw exposed personnel who are not necessary for the abatement of a dangerous condition.

Ex. P-56 at 1-3, ¶1-7. This was such a situation. T. 95. Stewart and Parks, however, failed to abide by this provision of the manual. In response to a direct question, Vandagriff stated as follows:

> Q. Based upon the safety manual, based upon the safety policies, did NASA have a duty to tell Scott Thomas to leave?
>
> . . .
>
> A. Yes.

T. 100-01. This would be particularly so because Parks knew or should have known that Thomas was in imminent danger while performing his inspection. T. 148.

Thomas told Stewart that, in his opinion, the cause of the problem was a cracked insulator, and offered to show it to Stewart. T. 190-91, 192, 310. Both of them went back to the open door of the switch, at which time, the switchgear arced again, severely burning Thomas and (to a much lesser degree) Stewart.

Roy Estess, Center Director of Stennis, formed an investigative task force, headed by NASA Safety Officer Vandagriff, to determine the cause of the incident. Upon completion of his investigation, Vandagriff submitted his report, which the Center Director, Roy Estess, submitted to NASA in Washington, D.C., as its official report.

The report (Ex. P-56 at IV-1) found in part that:

> NASA personnel must be made aware that procedures exist and are written for the assignment of specific responsibilities for any contingency. It is also apparent that the same weakness exists in the NASA contractor organization. Personnel must be trained to allow those who are responsible for a contingency to respond to it without interference and to make no assumptions regardless of the situation.

ARGUMENT AND AUTHORITIES

I. Did the Trial Court and the Fifth Circuit Court of Appeals, Contrary to the Decisions of Other Federal Circuit Courts, the United States District for the Southern District of Mississippi, and the Mississippi Supreme Court, Improperly Apply the Rules of Passive Owner/Contractor Negligence Applicable to a Case of Premises Liability Where there Is Active Owner/Contractor Negligence?

A. Prior Rulings of the Fifth Circuit and Other Federal Courts.

The Fifth Circuit addressed the issue of "control" and premises liability in Butler v. U.S., 726 F.2d 1057 (5th Cir. 1984). This case involved the Corps of Engineers' liability to a third party for its repair of the Hancock County, Mississippi, seawall after Hurricane Betsy. While performing its repairs, the Corps left a depression in the Mississippi Sound in which a number of people

subsequently drowned. Hancock County had on numerous occasions demanded that the Corps either fill the depression or that it post warnings. The Corps refused to do either. After suit was filed, the U.S. raised the discretionary function exception of the FTCA. The Fifth Circuit held that once the decision was made to repair the seawall, the Corps of Engineers was under an affirmative duty to do the repair work with reasonable care. Id at 1063. As applies here, once NASA supervisory personnel, Parks and Stewart, made the decision to take control of the situs of the incident, then liability for their negligence attached.

The Fifth Circuit also addressed such an issue in the context of Texas law in the case of Alexander v. United States, 605 F.2d 828 (5th Cir. 1979), holding that while the de facto control of the situs or active negligence on the part of the government would subject it to liability, there was no such showing: "The United States is only liable for the active negligence of its employees under the FTCA . . .." Id at 835. See also Aretz v. United States, 604 F.2d 417 (5th Cir. 1979), holding that "employment of an independent contractor [does not] insulate the United States from liability for its own employees' independent acts of negligence which occur in connection with the work of an independent contractor." Id at 427.

Other Federal Courts have come to the same conclusion that once the government is "in charge of" or takes over the situs, then it is liable for the consequences of its failure to remedy a dangerous situation of its own making. Skinner v. U.S., 209 F.Supp. 424 (E.D.Ill.1962); Fentress v. U.S., 431 F.2d 824 (7th Cir. 1970). See also Logue v. United States, 412 U.S. 521, 93 S.Ct. 2215, 37 L.Ed.2d 121 (1973).

In Petznick v. United States, 575 F.Supp. 698 (D.Neb. 1983), the Nebraska District Court held that in the context of the Federal Tort Claims Act, where the employer of an

independent contractor retains a "sufficient degree of control over the manner in which the contract is to be performed", then the employer (the United States) may be liable for its own "direct" negligence. 575 F.Supp. at 704.

The Petznick court relied on not only the decisions in Alexander and Aretz, supra, but also upon decisions of the United States Court of Appeals for the Ninth Circuit. It held that where the United States directs the independent contractor to perform hazardous activities in violation of applicable safety requirements, then it may be liable for its negligence to the employee of the independent contractor. Id. See Rooney v. United States, 634 F.2d 1238 at 1243-44(9th Cir. 1980); McGarry v. United States, 549 F.2d 587 (9th Cir. 1976).

The First Circuit adopted this same logic in Dube v. Pittsburgh Corning, 870 F.2d 790 (1st Cir. 1989). The Eighth Circuit also held in Madison v. United States, 679 F.2d 736 (8th Cir. 1982) that the United States may be sued for negligence occurring in its "normal day to day" operations as such constitute active negligence rather than mere discretionary action.

In short, the decision at bar is contrary to the logic and decisions of a number of other Federal Circuits holding that the United States is culpable for its active negligence resulting in injury to the employee of an independent contractor. This is so even where the United States has delegated its premises control by contract to an independent contractor. The Fifth Circuit has itself held contrary to the position taken in the case at bar, not only in the application of the appropriate rules of decision to Texas law, but to Mississippi as well. Butler, supra.

B. The Mississippi State Court Decisional Rules.

Mississippi applies a doctrinal distinction between

culpability for active negligence, and non-culpability for passive conduct. Specifically, where NASA, the premises owner, creates a dangerous condition, then NASA is actively negligent, and can be held liable for injury to a subcontractor's employee, such as Thomas. See Downs v. Choo, 656 So.2d 84 (Miss.1995). This occurred when unauthorized NASA personnel, Stewart and Parks, invaded the perimeter of the safety barricade at the site of the faulted switchgear, and set in motion the events leading to Thomas' injury.

The rules of Jones and Hill (infra) only apply if the activity of the contractor constitutes passive negligence. This is made clear in the case of Accu-Fab v. Ladner, 778 So.2d 766 (Miss. 2001).

In Accu-Fab, Anderson, the general contractor, had decked a roof prior to the completion of a stairwell. The subcontractor hired Accu-Fab to construct the stairwells. Accu-Fab, with the permission of Anderson, cut a hole in the roof. Neither Anderson nor Accu-Fab placed a warning on the roof. The next day, Ladner, an employee of Bracken, fell through the hole in the roof and died. The Mississippi Supreme Court held that because the contractor controlled the workplace, it owed a duty to provide a safe workplace for the employees of its sub. Id at 768-69. The Mississippi Supreme Court specifically distinguished Jones from Accu-Fab, in that there was an issue as to whether there was any notice to Ladner's employer.

This distinction is made even more evident in the recent decision of the Mississippi Court of Appeals in Smith v. Noble Drilling, Inc., 2000-CA-00476-COA (May 8, 2001), in which the court unequivocally held that the failure of the plaintiff (an employee of an independent contractor) to show that the defendant owner retained control over the premises mandated a verdict for the defendant.

Applied to the case at bar, the issue is not whether

Johnson Controls was aware that there was a faulted switchgear prior to Thomas' injury. The issue is the culpability of NASA for the direct violation of its contract with Johnson Controls for breaching a secured area, taking charge of the damaged switchgear unit, removing the safety warning tape, and opening up the damaged unit for inspection by all personnel present without notice to Johnson Controls. NASA set the stage for the subsequent electrical explosion in which Thomas was injured. This was a clear violation of NASA's own safety manual.

Because NASA had, without authorization, actively taken control of the switchgear, removed the safety barriers, opened up the switch to undertake an inspection, and given no notice to Johnson Controls, then NASA was actively negligent. The trial court and the Fifth Circuit applied the wrong rules of law to this case.

Neither the trial court nor the Fifth Circuit address this distinction where the owner is culpable due to its active negligence by active interference with the contractor. Liability rests on NASA, not because the switchgear initially faulted, but because NASA invaded the warning barrier in violation of its own published safety precautions, thereby enhancing the danger. The net result of such a holding is that from this point forward, any contractor is immune from liability for its conduct, even if its actions defeat safety precautions previously implemented by its subcontractors.

Key to this analysis is the testimony of the NASA Safety Officer, Wendell Vandagriff, who stated that NASA owed, at the very least, a duty to either warn Scott Thomas to leave the immediate area of the switchgear or warn him that the switchgear had not been de-activated.

II. Mississippi's Statutory Rule of Comparative Negligence Requires Apportionment of Fault in this Case.

The District Court and the Appeals Court ignored that NASA personnel violated their own safety manual when they breached the tape barrier placed by Johnson Controls to prevent injury to curious onlookers, and by opening up the casing and inspecting the damaged switchgear. In short, NASA seized de facto control of the faulted switch site from Johnson Controls. Compare this to the negligence of Thomas, who, following the example of his superior, Parks, looked inside of the already opened doors of the switch and pointed to a cracked insulator. While Thomas knew that the gear should be considered energized, it is also true that the actions of NASA persuaded Thomas that the gear was not energized.

The decision of the trial court, as affirmed by the Fifth Circuit, serves to effectively abolish the doctrine of comparative negligence as statutorily adopted by the Mississippi legislature and as interpreted by the Mississippi Supreme Court in premises liability cases. Miss. Code Ann. §11-7-15 (1972) establishes as law that an injured party's negligence shall not bar recovery, but the defendant will be entitled to diminish damages to the extent that negligence can be apportioned.

Accu-Fab v. Ladner, supra, is instructive again in this light. The Mississippi Supreme Court addressed the application of apportionment of fault in light of the comparative fault of the claimant and found that Anderson was 70% at fault, Accu-Fab 25%, and Ladner, the deceased employee, 5%.

By its terms, and by Mississippi case law, the doctrine of comparative fault as codified in §11-7-15 applies to all personal injury actions. It should have been applied in this case. Such a holding is consistent with the Federal Tort

Claims Act, which states: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . .." 28 U.S.C. §2764.

Wendell Vandagriff testified that NASA interfered with Johnson Controls' responsibility for the faulted switch site, and negligently failed to warn Scott Thomas away from the switch. To hold in the face of such uncontradicted testimony that NASA bears no responsibility for the injury to Thomas ignores the active negligence of NASA. NASA's interference with the exclusive control of its facility contractor subjects it to liability for the foreseeable consequences of that interference. See Lambert v. Georgia-Pacific Corp., 32 F.Supp.2d 914 at 917 (S.D.Miss. 1999).

The trial court based its determination that Johnson Controls had unfettered control over the site because Johnson Controls, as site contractor, had sole contractual responsibility in the switching procedure. R.E. 39. The trial court's error is that it stops its analysis of who had contractual control of the work site at that point. That is not the focus of the argument. The issue is whether Johnson Controls had de facto control of the accident situs at the time of the injury to Thomas; not at the time that the gear was initially damaged. The evidence is that, in fact, NASA supervisory personnel had assumed de facto control of the switch site before Thomas' injury.

Vandagriff testified that NASA supervisory personnel Chuck Stewart and Walt Parks violated the restricted area established by Johnson Controls' tape barricaded site; they violated the procedures established by the NASA Safety Manual; and they seized de facto control of the site from Johnson Controls. Stewart admitted that he was not authorized to enter into the area, and that he wasn't qualified to work on the switchgear. Tr. 312-13. Even so, he and Parks invaded the barricade, opened up and inspected

the switch, in effect, enticing Thomas to enter a highly dangerous area.

CONCLUSION

Where it is the affirmative act of NASA in violation of its own published safety procedures that led to the injury to Thomas, then Mississippi law regarding the active negligence of NASA in light of the alleged comparative negligence of Thomas should be the focus of the court. Because the trial court and the Fifth Circuit Court of Appeals focused on the contractual relationship of Johnson Controls to the owner-subcontractor, rather than the de facto control of NASA's supervisory personnel at the accident site, the trial court and the appellate court erred in determining that NASA had no culpability for the injury to Thomas.

This decision on the part of the Fifth Circuit Court of Appeals is directly contrary to other decisions of the Fifth Circuit, as well as other Federal Courts of Appeals.

This Honorable Court should grant the Petition for Writ of Certiorari and reverse the trial court and the Fifth Circuit, and remand the case with instructions to allow the matter to proceed to a full hearing on the merits.

Respectfully submitted,
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June 7, 2001

App. 1

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-60029
SUMMARY CALENDAR

SCOTT THOMAS, ET AL,
Plaintiffs,

SCOTT THOMAS,
Plaintiff-Appellant,

v

S & C ELECTRIC COMPANY; ET AL,

Defendants,

UNITED STATES OF AMERICA,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Mississippi,
Southern Division
(1:98-CV-137-BrR)

Before REYNALDO G. GARZA, BARKSDALE, AND STEWART, Circuit Judges.

PER CURIAM:[1]

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1. Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and

Scott Thomas ("appellant") asserted a negligence claim against the United States ("appellee") under the Federal Tort Claims Act ("FTCA"). 28 U.S.C. § 1346(b). Appellant's claim is based on injuries he suffered on April 12, 1995 when he was burned while inspecting an electrical switch gear unit located at NASA' s John C. Stennis Space Center ("SSC) in Hancock County, Mississippi. Appellant alleges that his injuries were caused, in part, by NASA's failure to provide a safe workplace and failure to properly operate and maintain the SSC's electrical distribution system. At the district court, the case was tried to the bench and, at the close of the plaintiff's case, the court granted appellee's motion for judgment of dismissal under Fed. R. Civ. P. 52 (c) . The district.. court prepared written findings of fact and conclusions of law and made them part of the record in this case. Having reviewed the record and the briefs, we agree that judgment as a matter of law was appropriate in this case and AFFIRM based on the district court opinion which is attached hereto as appendix A.

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is not precedent except under the limited circumstances described in 5th Cir. R. 47.5.4.

App. 3

IN THE UNITED STATES DISTRICT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

SCOTT THOMAS, Plaintiff

v.

CIVIL ACTION NO.

1:98cv137BrR

UNITED STATES OF AMERICA, Defendant

MEMORANDUM OPINION

This action came on for trial before the Court without a jury on September 13, 1999. At the close of the plaintiff's case the United States moved ore tenus for judgment of dismissal on partial findings under Rule 52(c), Federal Rules of Civil Procedure. After due consideration of the evidence of record and the applicable law, the Court announced that the United States' motion would be granted and that written findings of fact and conclusions of law would be prepared and made a part of the record in accordance with Rule 52(c). Accordingly, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

Scott Thomas ("Thomas") asserts a claim of negligence against the United States under the provisions of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680. Thomas seeks money damages for injuries he received on April 12, 1995, when he was burned while inspecting a 13,800 volt ("13.8KV") electrical switch gear unit located at NASA's John Stennis Space Center ("SSC) in Hancock County, Mississippi. Thomas alleges that his injuries were caused, in part, by the negligence of NASA personnel in failing to provide him with a safe workplace and in failing to properly operate and maintain SSC's 13.8KV electrical distribution system, of which the switch gear unit was a part. The United States asserts that Thomas's claim is jurisdictionally barred by the FTCA's discretionary function exception, 28 U.S.C. § 2680(a), and the FTCA's contractor exclusion, 28 U.S.C. §§ 1346(b), 2671. The United States also asserts that even if this Court has jurisdiction over Thomas's claim it cannot be held liable under Mississippi law.

On the date of his accident Thomas was employed at SSC by Johnson Controls World Services, Inc. ("Johnson Controls") as an electrical engineer. NASA and Johnson Controls had entered into a contract whereby Johnson Controls served as the Facilities Operating Services Contractor ("FOSC") for SSC. As the FOSC, Johnson Controls was responsible for, among other things, operating and maintaining the SSC 13.8KV electrical distribution system.[1] This included the operation, maintenance, and repair of electrical switch gear units which were part of the system. NASA employees did not operate or maintain the electrical

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1. This system distributed electrical power to the buildings and other structures located throughout SSC.

distribution system or its component switch gear units.

As of April 1995 Thomas had been employed by Johnson Controls as an electrical engineer for approximately six years. He possessed a bachelor of science degree in electrical engineering from the University of South Alabama. As an electrical engineer, Thomas was assigned to the B-Complex of the Space Shuttle Main Engine test area at SSC. His office was located in SSC Building 8301.

Although Thomas's job responsibilities did not include operating or maintaining 13.8KV switch gear units, Thomas was familiar with SSC's 13.8KV electrical distribution system and, in particular, its switch gear units. Prior to April 12, 1995, Thomas had, on occasion, supervised Johnson Control's two-man high voltage crew and was very knowledgeable of their duties and responsibilities as they related to switching operations at SSC. Thomas knew that the high voltage crew was responsible for the operations, maintenance, and repair of the 13.8KV switch gear units located throughout the SSC electrical distribution system. He also knew that the high voltage crew was made up of Roddy Bilbo and Melvin Barnes, two Johnson Controls employees with many years of experience in high voltage operations at SSC.

As an electrical engineer with Johnson Controls, Thomas knew that electricity was dangerous. He also knew that. when dealing with high voltage equipment, such as a 13.8KV switch gear unit, one should always consider it to be energized until proven otherwise.

On the morning of April 12, 1995, the Johnson Controls, high voltage crew of Bilbo and Barnes began performing a, routine switching operation on SSC's 13.8KV electrical distribution system. They were supervised by Steve Giroir, a Johnson Controls high voltage engineer. The

purpose of the switching operation was to transfer power on the 13.8KV system from circuit 22 to circuit 12 in support of work being performed by another SSC contractor. Before performing the switching operation Bilbo and Barnes discussed their plans with each other and with their supervisor, Giroir. Giroir was the ultimate authority over switching operation. Neither the crew nor Giroir discussed the switching operation with NASA or received any directions, supervision, instructions, or guidance from NASA on how the switching operation was to be performed. NASA personnel were not to Participate in the switching procedure.

At approximately 7:00 a.m. Bilbo, Barnes, and Giroir arrived at- SSC Building 1103 to operate its switch gear unit as part of that morning's switching operation.[2] The plan devised by Bilbo and Barnes called for them to switch Building 1103's power source from circuit 22, the building's then current source of electricity, to circuit 12. This was to be accomplished by Bilbo first closing circuit 12 followed by Barnes opening circuit 22 through the manual operation of switching handles located on outside of the switch. This sequence was chosen by the high voltage crew because they

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2. Building 1103, also known as the Mississippi Technology Transfer Center, was constructed by Tilley Constructors & Engineers, Inc. for the State of Mississippi in the mid-1980s. The building was transferred by the State to NASA on June 11, 1987. The electricity to the building was supplied by circuits 12 and 22 on SSC's 13.8KV electrical distribution system. The switch gear unit located outside Building 1103 was used to switch the building's power source from one circuit to the other.

wanted to avoid a power outage in Building 1103 during the switching procedure.[3]

At approximately 7:04 a.m. Bilbo and Barnes began the switching procedure at Building 1103. Giroir was present but did not participate in the actual switching process. The switching began with Bilbo manually closing circuit 12 on the switch by operating a switch handle located on the north side of the switch gear unit. Within a few seconds of circuit 12 being closed Barnes began to manually open circuit 22 by similarly operating the switch handle located on the south side of the switch gear unit. As Barnes opened circuit 22 there was an explosion or fault inside the switch. A high voltage arc blast blew the south switch door open (circuit 22 side). Neither Bilbo nor Barnes were injured from the arc blast although Giroir momentarily thought that they had been killed.

Following the explosion the high voltage crew placed duct tape with orange "flagging" tape around the switch. They knew the switch was still energized. They also knew that circuit 12 was still closed because power was being provided to Building 1103. They also knew that the cabinet door on the circuit 22 side of the switch had been blown partially opened by the arc blast. Giroir, their supervisor, knew that the switch had faulted and that the switch was still energized. Giroir also knew that the high voltage crew had placed tape around the switch, and that the switch door on the circuit 22 side was ajar as a result of the explosion.

After taping-off the switch, the high voltage crew and Giroir departed from Building 1103 to continue their

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3. By closing circuit 12 before opening circuit 22, Building 1103 was to be briefly powered by two closed parallel circuits.

switching procedure at other buildings. They did not notify NASA of the fault. Their plan was to return to the switch after they completed their switching procedure.

Thomas arrived at work around 7:00 a.m. that same morning. Upon his arrival he overheard radio traffic about a power outage in the B-Complex area. He learned that Lamar Nowland, a Johnson Controls engineering services manager, and Bruce Beckman, a Johnson Controls field engineer, were en route to the SSC main substation to investigate the outage. At the request of Phil Price, one of Thomas's Johnson Controls supervisors, Thomas also proceeded to the substation. While en route Thomas continued to monitor the radio traffic and learned that Nowland and Beckman had changed their plans and were now headed to Building 1103. He also overheard a radio conversation between Beckman and Charles Stewart, Jr., a NASA civil engineer, wherein Beckman and Stewart agreed to meet at Building 1103 to see what had happened at that location.

Contrary to the directions given him by Price, Thomas immediately abandoned his travel to the substation and proceeded to Building 1103. Upon arriving he parked his truck in the parking lot and remained in it for several minutes. While sitting in his truck he observed Stewart, Walt Parks, another NASA employee, Beckman, and Nowland standing near the switch. Shortly, Beckman approached Thomas's truck, engaged him in a brief conversation, and then returned to the switch gear unit area. At that time, Thomas got out of his truck and approached the switch. The entire switch was taped-off with the duct tape and "flagging" tape that had been placed there as a warning by the high voltage crew. The outside of the switch was posted with "CAUTION - HIGH VOLTAGE - KEEP OUT" signs. The inside panel of the switch doors was also posted with

warning signs which read: "DANGER - HIGH VOLTAGE - KEEP OUT - QUALIFIED PERSONS ONLY." Upon approaching the switch Thomas observed that one of the switch doors was open and that one was down. Upon looking inside the switch he saw charring and what he believed to be a cracked insulator. It was Thomas's opinion that the cracked insulator had caused the earlier fault.

Because of his training Thomas considered the switch gear unit to be energized with 13,800 volts of electricity. Thomas also saw that it was not locked and tagged, that one of the doors was opened, that it appeared to be damaged, that the inside was all charred, and that melted metal was present.

After inspecting the damaged switch gear unit, Thomas left the immediate switch area and approached Stewart, who was standing in the adjacent parking lot. Thomas asked Stewart to come look at the cracked insulator. Stewart, believing the switch gear unit to be de-energized because of Thomas's request, agreed, and Thomas and Stewart thereafter entered the barricaded area and positioned themselves immediately in front of the open switch door on the south side of the switch gear unit. According to Thomas, he re-entered this area by crawling or crouching because he believed the damaged switch gear unit was still energized. Once Thomas had positioned himself in front of the switch gear unit, he pointed to the cracked insulator with his right hand. At that moment a second arc blast occurred which injured both Thomas and Stewart.

According to the testimony at trial, Johnson Controls was in charge of the switch gear unit and the securing of the area around it between the time of -the initial switching procedure at building 1103 when the switch gear unit faulted and the time of Thomas's accident. Giroir as the Johnson Controls high voltage engineer and as the

supervisor of the Johnson Controls high voltage crew, was ultimately responsible for securing the switch gear unit until it had been rendered safe by being completely deenergized. At no time on the morning of April 12, 1995, was the switch gear unit de-energized prior to Thomas's accident.

At no time prior to his accident had Thomas been asked, directed, or instructed to go to Building 1103 to inspect its 13.8KV switch gear unit. At the time of his accident, Thomas's immediate supervisors were Johnson Controls employees. His chain of command was exclusively within Johnson Controls.

Nowland, an engineering services manager for Johnson Controls and, like Giroir, a supervisor, was present at Building 1103's 13.8KV switch gear unit prior to and at the time of Thomas's accident. Before the accident, Nowland had been Informed of what had happened at the switch gear unit when it initially faulted at approximately 7:04 a.m.

The Court is compelled to find that at no time during the switching operation was NASA in control of that procedure. NASA did not supervise or direct any Johnson Controls employees, in particular Thomas, in their conduct regarding the procedure. Moreover, there is no evidence that any NASA employee exercised or attempted to exercise any control over the faulted switch gear unit on the morning of April 12, 1995.

Thomas did not receive any directions or instructions, either explicitly or implicitly, from either NASA or Johnson Controls to go to Building 1103. Similarly, once there Thomas did not receive any directions or instructions from either NASA or Johnson Controls to inspect the damaged switch gear unit or to otherwise enter the barricaded area. The evidence clearly shows that Thomas's presence at Building 1103 and his actions after arriving were of his own choosing.

The evidence also establishes that of all the persons present that morning., Thomas was the most qualified by education, training, and experience to appreciate that the damaged switch gear unit presented a hazard to those who would attempt its close inspection prior to de-energizing. Moreover, it is obvious to this Court that both Parks and Stewart, the only NASA personnel present prior to Thomas's accident, believed, unlike Thomas, that the switch gear unit was de-energized and safe. In fact, Stewart testified that had he known the switch gear unit was still energized he would not have approached it. There is no credible evidence that NASA had any foreknowledge of any problem with Building 1103's switch gear unit be-fore Thomas's accident on the morning of April 12, 1995. on this point Thomas claims that a misphasing problem existed when the switch gear unit was installed and that the problem was never corrected prior to his accident. According to Thomas it was this misphasing problem that was the cause of the initial fault. However, the evidence adduced by Thomas at, trial on this point is speculative at best and with considerable contradiction.[4] Moreover, there is no plausible evidence that NASA knew or should have known of any phasing problem with this switch gear unit or that a misphased switch constituted a dangerous condition.[5]

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4. For example, Thomas introduced into evidence the NASA accident investigative report wherein two alternative causes were identified: a loose blade in the circuit 22 switch or an "out-of-phase" condition.

5. Noteworthy on this point is the testimony of Buddy Fountain, the architect whose firm designed Building 1103. Mr. Fountain testified at trial that in his opinion the

The Court finds that Thomas has not presented any credible evidence that shows that prior to Thomas's accident NASA knew or should have known the switch gear unit constituted a danger to persons who, like Thomas, would ignore posted warnings signs, a barricade, and clear indications of damage to an energized switch in order to attempt a close inspection. The evidence, on the other hand, does show that Johnson Controls, as the FOSC at SSC, knew the switch gear unit was damaged and dangerous following the initial fault at 7:04 a.m. Bilbo knew it. Barnes knew it. Giroir knew it. Nowland knew it. And, most importantly, Thomas knew it.

CONCLUSIONS OF LAW

Rule 52(c) of the Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> If during a trial without a jury a party has been fully heard with respect to an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against the party on any claim, counterclaim, cross-claim or third party claim that cannot under controlling law be maintained or defeated without a favorable finding

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switch was not misphased because such a condition would have caused the building's elevators to run backwards and other anomalies. Mr. Fountain also testified that it was his firm's responsibility to insure that the switch gear unit was properly phased prior to the building being turned over to the State of Mississippi in 1987. Mr. Fountain was unaware of any phasing problems with Building 1103's switch gear unit.

> on the issue, or the court may decline to render any judgment until the close of all evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

Fed. R. Civ. P. 52(c).

In considering a Rule 52(c) motion, the Court is the trier of fact. The Court is not required to view the evidence submitted in the light most favorable to the non-moving party. Roth v. American Hosp. Supply Corp., 965 F.2d 862, 865 (10th Cir. 1992). Rather, the Court weighs the evidence and assesses the credibility of witnesses to determine whether or not the plaintiff Has demonstrated a factual and legal right to relief by a preponderance of the evidence. Du Pont v. Southern Nat'l Bank of Houston, Tex., 771 F. 2d 874, 879 (5t Cir. 1985) , cert. denied, 475 U.S. 1085 (1986).[6] In this case Thomas has been fully heard on the issues of liability and damages. it is therefore appropriate for the Court to consider the United States' Rule 52(c) motion on the issue of liability.

Absent clear consent, the United States is immune from suit. Block v. North Dakota ex rel. Bd. of Univ. & School Lands, 461 U.S. 273, 287 (1983) ; United States v. Testan, 424 U.S. 392, 399 (1976). The terms of such consent establish the court's Jurisdiction to entertain suit. Lehman v. Nakshian, 453 U.S. 156, 160 (1981) ; Testan, 424 U.S. at 399; McMahon v. United States, 342 U.S. 25, 27 (1951) ; Linkou v.

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6. Case law interpreting Rule 41(b) of the Federal Rules of Civil Procedure is applicable to Rule 52(c). Wright & Miller, Federal Practice and Procedure: Civil 2d §2573.1.

United States, 142 F.3d 271, 275 (5th Cir. 1998). Moreover, any "limitations and conditions upon which the government consents to be sued must be strictly observed, and exceptions thereto are not to be implied." Lehman, 453 U.S. at 161, quoting Soriano v. United States, 352 U.S. 270, 276 (1957) ; see also Garcia v. United States, 776 F.2d 116, 118 (5th Cir. 1985)
(exceptions must be narrowly construed against consent to sue). Thus, the doctrine of sovereign immunity bars suit against the United States unless there has been a clear and unequivocal waiver by the United States of its sovereign immunity. Boehms v. Crowell, 139 F.3d 452, 462 (5th Cir. 1998).

The FTCA represents such a clear and unequivocal waiver of the United States' sovereign immunity with respect to suits against the government based on alleged negligent acts and omissions of its employees.[7] That waiver is limited, however, and does not extend to any claim against the government which is "based on the exercise or performance or the failure to perform a discretionary function or duty on the part of the federal agency or employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). This exception, known as the "discretionary function exception," is said to "mark the boundary between Congress, willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit

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7. The FTCA provides that ,[t]he United States shall be liable respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

by private individuals." United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 40-7 U.S. 797, 808 (1984). It was Congress, belief that imposing liability on the government for the discretionary acts of its employees "would seriously handicap efficient government operations." Id. at 814 (internal citations omitted). See also Berkowitz v. United States, 486 U.S. 531, 536-537 (1988)(exception represents Congress' desire to prevent "judicial 'second-guessing, of legislative and administrative decisions ground in social, economic, and political policy through the medium of an action in tort").Whether the discretionary function exception bars suit against the United States in a given case depends on two factors. Baldassaro v. United States, 64 F.3d 206, 208 (5th Cir. 1995), cert. denied, 517 U.S. 1207 (1996). First, a discretionary act must be involved. That is, the act for which liability is sought to be imposed must involve "an element of judgment or choice." Gaubert v. United States, 499 U.S. 315, 322 (1991) (internal quotations omitted). Therefore, if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," the discretionary function exception does not apply because there is no "element of choice" as the government "has no rightful option but to adhere to the directive." Gaubert, 499 U.S. at 322, quoting Berkowitz, 486 U.S. at 536. Second, "even assuming the challenged conduct involves an element of judgment, it remains to be decided whether that judgment is of the kind that the discretionary function exception was designed to shield." Id. "Because the purpose of this exception is to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and Political policy the exception protects only governmental actions and decisions based on considerations of public policy." Id. at 323; see also Baldassaro, 64 F.3d at 208.

If the challenged conduct is of the nature and, quality that Congress intended to protect, Section 2680(a) applies even if there is negligence. "Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions." Dalehite v. United States, 346 U.S. 15, 34 (1953). The exception applies even if the government's act or omissions constituted negligence under state law, since it is operative "whether or not the discretion involved be abused." Id. Thus, once the Court determines that 'the conduct at issue discretionary and policy-based, negligence is irrelevant. See, Msylakowski v. United States, 806 F.2d 94, 97-98 (6th Cir. 1986).

In its Rule 52(c) motion the United States first argues that Thomas's claim is barred by the FTCA's discretionary function exception because NASA contractually delegated the responsibility for workplace safety at SSC to Johnson Controls. The United States contends that the decision to delegate that responsibility was a matter of judgment that was policy-based and is therefore protected by the discretionary function exception. The United States similarly argues that NASA's decision to contractually delegate to Johnson Controls the responsibility for the operations, maintenance, and repair of SSC's 13.8KV electrical distribution system and its component switch gear units is a discretionary act which falls within the discretionary function exception. The United States therefore asserts that because it had delegated all responsibility for workplace safety and for the operation and maintenance of the 13.8KV electrical distribution system to Johnson Controls it is immune from suit for alleged acts of negligence involving that delegation. While the Court believes were it to defer its ruling on the United States' motion until the close of all the evidence a compelling case for a Fed. R. Civ. P. 12 (b) (1) dismissal would likely exist under the discretionary function

exception, the Court concludes that there is insufficient evidence in the record at this time to establish that defense.

The United States next argues that Thomas's claim is jurisdictionally barred under the FTCA's contractor exclusion provision. The FTCA waives the United States' sovereign immunity only for personal injury or death "caused by the negligent or Wrongful act or omission of any employee of the Government while acting within the scope of his office or employment 28 U.S.C. § 1346(b). The FTCA defines government employees to include officers and employees of "any federal agency," but specifically excludes "contractors" from the definition of "federal agency" and "employee. 11 28 U.S.C. § 2671. Thus, liability of the United States cannot be premised upon the negligent acts or omissions of a contractor like Johnson Controls. United States v. Orleans, 425 U.S. 807, 814 (1976) ; Logue v. United States, 412 U.S. 526 (1973). Stated differently, the FTCA does not extend to acts of independent contractors. Therefore, in a FTCA action if the acts or omissions complained of were not committed by an "employee of the Government," but rather by an independent contractor, then the Court must dismiss for lack of subject matter jurisdiction. See Broussard v. United States, 989 F.2d 171, 177 (5th Cir. 1993). However, the Court again declines to dismiss Thomas's claim for lack of subject matter jurisdiction because the evidence at this stage of the trial does not support a finding by the Court that Thomas seeks to impose liability on the United States for the acts of Johnson Controls.

The Court thus concludes that , based upon the evidence of record, it has subject matter jurisdiction in this case by virtue of the FTCA's waiver of sovereign immunity. That waiver, as noted above, is limited however. Under the FTCA the United States is liable for the tortuous acts off its employees "under circumstances where the United States, if a private

person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S.C. § 1346 (b). In this case, liability is determined by Mississippi law. Palmer v. Flaggman, 93 F.3d 196, 199 (5th Cir. 1996) . Thus, in order to prevail in this case Thomas must demonstrate that under Mississippi law the United States, as a premises owner, breached a duty of care owed to him as an employee of Johnson Controls regarding the condition of the premises. As discussed below,
this he has failed to do. The Fifth Circuit Court of Appeals squarely addressed the duty imposed under Mississippi law on a premises owner towards the employees of its independent contractor regarding the condition of the premises in Hill v. International Paper Company, 121 F.3d 168 (5th Cir. 1997). In Hill an independent contractor's employee brought a negligence action against the premises owner for injuries the employee sustained as a result of the owner's allegedly negligent "location, placement, use and condition of [a] floor trolley." Id. at 170. The employee argued that the owner was under a duty to maintain reasonably safe conditions on its premises. The owner contended, on the other hand, that because the independent contractor had both actual and constructive knowledge of the alleged dangerous condition the owner was relieved of any duty to the employee .regarding that condition. The owner unsuccessfully sought summary judgment prior to trial, and following a jury verdict for the employee, the owner appealed. The Fifth Circuit vacated the Judgment, holding that under Mississippi law:

> if an independent contractor has actual or constructive knowledge of a dangerous condition . . . its employees cannot recover against the premises owner for negligence. Whether this rule is characterized as a type of "open and obvious" bar

> (a no duty rule) or as proof that a warning or knowledge satisfies an owner's duty is, for purposes of this opinion, irrelevant. The owner is not liable.

Id. at 176-77. In so holding, the Fifth Circuit relied upon the Mississippi Supreme Court's decision in Jones v. James Reeves Contractors, Inc., 701 So. 2d 774 (Miss. 1997). In Jones, the Mississippi Supreme Court considered, among other things, the question of whether an independent contractor's knowledge, through one of its supervisors, of a dangerous condition on the premises on which it was working relieved the premises owner from any duty to the contractor's employees to make the premises safe. In concluding that the premises owner was not an insurer of safety and not liable for injuries to an independent contractor's employee resulting from a dangerous condition which is, or should be known, to the employee, the Mississippi Supreme Court stated:

> Moreover, even if there existed a duty on the part of [the premises owner] to make the premises safe, the only way in which that duty would remain intact is if . . . [the independent contractor's site supervisor] did not know of the condition . . . . In City of Jackson v. Ball, 562 So. 2d 1267, 1270 (Miss. 1990) , we held that no warning need be given to employees of a contractor so long as the contractor knows of the danger. See also Mississippi Chemical Corp. v. Rogers, 368 So. 2d 220, 222 (Miss. 1979).

Id. at 783. Thus, both Hill and Jones unequivocally establish that under Mississippi law a premises owner cannot be held liable for an independent contractor's employee's injuries resulting from a dangerous condition on the premises which is either known or should be known to either the employee or the contractor. See also Lambert v. Georgia-Pacific

Corporation, 32 F. Supp. 2d 914, 916-917 (S.D. Miss. 1997) (knowledge of dangerous condition by either contractor or its employee absolves the premises owner of any liability for injuries to the employee). As stated above, the evidence presented by Thomas at trial clearly shows that both Johnson Controls and Thomas knew, or should have known, that following its initial fault at 7:04 a.m. Building 1103's, switch gear unit was dangerous to those who would attempt its close inspection prior to its de-energizing. They knew that the switch gear unit was still energized with 13,800 volts of electricity. They knew that the switch had faulted earlier with such force that Giroir believed the two high voltage technicians had been killed. They knew that the switch was damaged from the earlier fault with signs of charring and the presence of melted metal. They knew that the switch's south door had been blown open from the force of the earlier explosion and that the switch's internal components, which were energized, were not secure. They knew that the switch was posted with warning signs to keep out because of the dangers associated with high voltage. They knew that the switch had been barricaded by the high voltage crew to keep people out. The evidence, as presented by Thomas, overwhelmingly establishes that both Thomas and Johnson Controls knew that the damaged switch was a hazard. Thus, under Hill the United States is not liable.

The Court also concludes that there is yet another basis in this case to absolve the United States of liability under the principles set forth in Hill and Jones.. Under the terms of its contract with NASA, Johnson Controls, as the FOSC, was responsible for the operation, maintenance, and repair of SSC's electrical distribution system and, in particular, Building 1103's 13.8KV switch. There is no evidence that NASA retained any responsibility or right to control the nature and details of that work. When Thomas

was injured on April 12, 1995, Johnson Controls I high voltage. crew was engaged in that work as they were operating various switches, including Building 1103's, to isolate circuit 22 on the SSC's electrical distribution system. There is no evidence that NASA was either involved in the switching procedure or exercised control over Johnson Control, in its planning and execution of the switching procedure. The ultimate responsibility for carrying out the procedure was Johnson in that work as they were operating various switches, including Building 1103's, to isolate circuit 22 on the SSC's electrical distribution system. There is no evidence that NASA was either involved in the switching procedure or exercised control over Johnson Control, in its planning and execution of the switching procedure. The ultimate responsibility for carrying out the procedure was Johnson Control's. By virtue of that arrangement the United States is excused from any responsibility to Mr. Thomas for his injuries. As stated by the Fifth Circuit in Hill, "where the owner surrenders to the contractor all control over the performance of that aspect of the work that gives rise to the injury, there is . . . no liability." Hill, 121 F.3d at 174, citing Magee v. Transcontinental Gas Pipe Line Corn., 551 So.2d 182, 186 (Miss. 1989); see also Jones, 701.So.2d at 782 (the critical factor in determining liability is "whether [the premises owner] maintains any right of control over the performance of that aspect of the work which gave rise to the injury"). The undisputed facts establish that Johnson Controls, not NASA, was in complete control of the switching operation that gave rise to Thomas's injury. The 'United States exercised no control over the means, methods, techniques, and procedures Johnson Controls' high voltage crew used in isolating circuit 22, operating Building 1103's switch, and in securing the switch after it initially faulted.

Thus, the United States owed no duty to Thomas and is absolved of liability. See Lambert, 32 F.Supp.2d at 916-917.

The Court concludes that the United States, as the premises owner, did not breach any duty it owed to Thomas, as an employee of its contractor, under Mississippi law. Rather, the sole proximate cause of Thomas's injury was his own negligence. No employee of NASA engaged in any negligent or wrongful conduct in breach of any duty owed to Thomas under Mississippi law.

Conclusion

Based upon the foregoing findings of fact and conclusions of law, the United States' motion for a judgment of dismissal on partial findings is granted. This action shall be dismissed with prejudice, with all costs taxed against Thomas. Accordingly, a separate Final Judgment in conformity with and incorporating by reference the foregoing Memorandum Opinion shall issue this date.

DATED this the 18th day of November, 1999.

/s/DAVID BRAMLETTE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

SCOTT THOMAS, Plaintiff

v.CIVIL ACTION NO. 1:98cv137BrR

UNITED STATES OF AMERICA, Defendant

FINAL JUDGMENT

This action comes before the Court on the defendant's motion for a judgement of dismissal on partial findings under Rule 52(c), Federal Rules of Civil Procedure, following the close of the plaintiff's case during a trial before this Court without a jury. The plaintiff having been fully heard on the issues of liability and damages and the Court having entered written findings of fact and conclusions of law as set out in its Memorandum Opinion, which is hereby incorporated by
reference, the Court finds that the defendant's motion is well-taken and should be granted. Accordingly,

IT IS ORDERED AND ADJUDGED that the defendant's motion for dismissal on partial findings be, and it is hereby, granted.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff's complaint seeking relief under the Federal Tort

Claims Act be, and it is hereby, dismissed with prejudice with all costs taxed against the plaintiff.

SO ORDERED AND ADJUDGED on this, the 18th day of November, 1999.

/s/DAVID BRAMLETTE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-60029

SCOTT THOMAS, ET AL Plaintiffs
SCOTT THOMAS, Plaintiff - Appellant
v.
S&C ELECTRIC COMPANY, ET AL
Defendants
UNITED STATES OF AMERICA
Defendant - Appellee

U.S. COURT OF APPEALS
FILED
MARCH 12, 2001
CHARLES R. FULBRUGE, III
CLERK

Appeal from the United States District Court
for the Southern District of Mississippi, Biloxi

ON PETITION FOR REHEARING

Before REYNALDO G. GARZA, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT: March 12, 2001

/s/REYNALDO G. GARZA
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR THE STAY OF THE
MANDATE

App. 27

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-60029
Summary Calendar

D.C. Docket No. 1:98-CV-137-BrR

SCOTT THOMAS, ET AL
Plaintiff s

SCOTT THOMAS
Plaintiff-Appellant

v.

S & C ELECTRIC COMPANY; ET AL
Defendants

UNITED STATES OF AMERICA
Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Mississippi
Biloxi Division

U.S. COURT OF APPEALS
FILED
JAN 17 2001
CHARLES R. FULBRUGE, III
CLERK

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAR. 21, 2001

J.T. NOBLIN, CLERK
BY: /s/_____DEPUTY

Before REYNALDO G. GARZA, BARKSDALE, and STEWART, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that *plaintiff-appellant pay to* defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: MAR. 20, 2001.

A true copy
Test
Clerk, U.S. Court of Appeals, Fifth Circuit
By: /s/Larry Gegenheimer, Jr.
Deputy
New Orleans, Louisiana March 20, 2001

APPLICABLE PROVISIONS OF THE S&C MANUAL

EXHIBIT P-6

When optional key interlock schemes have been furnished, duplicate keys are provided for use during installation. To maintain the integrity of the key interlock scheme, the duplicate key must be destroyed or made accessible only to authorized persons.

Ex. P-6 at 22, S&C Manual 662-505.

App. 30

APPLICABLE PROVISIONS OF
THE STENNIS SAFETY MANUAL

EXHIBIT P-12

Operations involving high voltage (greater than 550 volts) shall require written procedures approved by the cognizant safety representative and NASA/SSC SRM&QA [Safety Reliability Maintainability and Quality Assurance] Manager . . ..

Ex. P-12, NASA Safety Manual, ¶6.1, 1.c at 6-1, 6-8.

. . .

Personnel shall not make safety interlocks inoperative or by-pass them when making equipment repairs or adjustments. The only exception will be where specific authorization for a deviation has been submitted to the cognizant safety representative and approved by the NASA/SSC SRM&QA Manager.

Ex. P-12 at 6-8.

. . .

The official in charge of the workplace or the individual empowered to act for that official shall take immediate abatement action or cease operations and withdraw exposed personnel who are not necessary for the abatement of a dangerous condition.

Ex. P-12 at 1-3, ¶1-7.

. . .

Imminent Danger Procedures:

Whenever it is concluded that danger could reasonably be expected to cause death or serious physical harm, affected employees and the officials in charge of the workplace shall be immediately notified of the danger.

Ex. P-12 at 1-3.

PORTIONS OF THE TESTIMONY

EXCERPT FROM THE TESTIMONY OF WENDELL VANDAGRIFF:

Q. Based upon the safety manual, based upon the safety policies, did NASA have a duty to tell Scott Thomas to leave?

. . .

A. Yes.

T. 100-01

EXCERPT FROM THE TESTIMONY OF CHUCK STEWART:

Q. Okay. And you knew of the date of the incident that you were not authorized to enter the taped-off area, didn't you?

A. Yes, I did.

Q. In fact, that violates NASA safety directives or it–

A. Yes, it did.

Q. Okay. You also–

THE COURT: How did it do that, sir?

A. I wasn't authorized to be in the area. I wasn't authorized to work on the–I wasn't qualified to work or even look at problems on a thirteen eight switch gear.

Tr. 312-13.

App. 33

EXCERPTS FROM THE NASA INCIDENT REPORT

EXHIBIT P-56

. . . NASA personnel must be made aware that procedures exist and are written for the assignment of specific responsibilities for any contingency. It is also apparent that the same weakness exists in the NASA contractor organization. Personnel must be trained to allow those who are responsible for a contingency to respond to it without interference and to make no assumptions regardless of the situation.

At IV-1